BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF BALMER GARDEN WATER COMPANY, WAYNE WARD AND MICHAIL W. SODERQUIST, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, AND ARTHUR PAGNOTTA, Respondents.	PCHB No. 82-68 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

This matter, the appeal of an approval granted by the Department of Ecology to Arthur Pagnotta for appropriation of public ground water, came on for hearing before the Pollution Control Hearings Board, Gayle Rothrock, Chairman, Lawrence Faulk, Member, convened at Spokane, Washington on February 4, 1983. William A. Harrison, Administrative Law Judge, presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellants appeared by their attorney, William Etter. Respondent

Department of Ecology appeared by Robert E. Mack, Assistant Attorney General. Respondent Arthur Pagnotta appeared by his attorney, Victor Felice. Court Reporter Michael O'Brien recorded the proceedings.

Respondent Department of Ecology filed its Motion to Dismiss in this matter on January 26, 1983. At the outset of the hearing, the parties stipulated on the record that the issues which appellant raised regarding statutes and rules of the State Department of Social and Health Services (DSHS) were withdrawn. The Motion to Dismiss was then argued by counsel with regard to the issues raised by appellant under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Having considered the Motion to Dismiss, the affidavit of George Farmer, the affidavit of Arthur Pagnotta, the affidavit of George B. Schlender and attachments thereto, together with the oral argument of counsel for all parties, and being fully advised, the Motion is denied.

Witnesses were sworn and testified. Post hearing briefs were submitted. From testimony heard or read, the Board makes these

FINDINGS OF FACT

I

On December 6, 1980, Mr. Arthur Pagnotta applied to Department of Ecology (DOE) to appropriate public ground water in the amount of 200 gallons per minute from a 10 acre site located one-and-a-half miles north of the City of Airway Heights in Spokane County. This appropriation would serve the domestic water needs of a mobile home court which Mr. Pagnotta proposes for the site. The development would accommodate 63 mobile homes and include on-site streets and sewage disposal facilities.

II

The DOE approved the requested appropriation, which is for approximately 1/2 cubic foot per second. Under WAC 197-10-170(2)(b) appropriations of ground water of 10 cubic feet per second, or less, are categorically exempt from the threshold determination and environmental impact statement (EIS) requirements of SEPA, chapter 43.21C RCW.

III

Appellants argue that DOE's approval prior to the preparation of an EIS is unlawful. While acknowledging the SEPA exemption for the ground water appropriation at issue, appellants assert that the comprehensive proposal to develop a trailer court is a "major action significantly affecting the quality of the environment" requiring preparation of an EIS by some agency prior to the approval of this ground water appropriation.

IV

Mr. Pagnotta has contacted the planning department of the local general purpose government and has obtained an "approved plot plan" from Spokane County for the proposed mobile home court. He has also requested approval from DSHS for the water supply system associated with this water appropriation.

V

The site is not within an area with a declining water table, nor have appellants alleged that this appropriation would impair any existing water rights or that water is not available for appropriation.

VI

The site is approximately 50 feet from the property of Spokane Raceway, an automobile race track hosting national competition. The site is approximately one mile from Geiger Field, a major airport.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to the following

CONCLUSIONS OF LAW

I

Appellants' contention that an EIS must be prepared prior to DOE's approval of this ground water appropriation is without merit.

II

The determination of whether an EIS is required is made with respect to the total proposal. WAC 197-10-070(1). "Proposal" means:

> ...a specific request to undertake any activity submitted to, and seriously considered by, an agency or decision maker within an agency, as well as any action or activity which may result from approval of any such request.
> WAC 197-10-040(29).

The "total proposal" is the proposed action together with all proposed activity functionally related to it. WAC 197-10-060(2). Here, the proposed ground water appropriation facilitates the balance of the mobile home court proposal which development is also necessary to the appropriation in that it constitutes the beneficial use upon which permission to appropriate water is premised. The ground water

appropriation is therefore functionally related to development of the mobile home court and, under the definitions above, the total proposal consists of each specific request to a public agency to undertake development of the mobile home court.

III

Appellants have shown three specific requests to public agencies for development of the mobile home court: 1) this request for appropriation from DOE, 2) a request for approval of a water supply system from DSHS and 3) a request for an "approved plot plan" from Spokane County. The first two requests are categorically exempt from the EIS requirements of SEPA under WAC 197-10-170(2)(b) exempting both de minimis ground water appropriation and construction of a distribution system for it. The third request, to Spokane County, may or may not be categorically exempt from EIS requirements.

IV

On the assumption, most favorable to appellants, that the request to Spokane County is not categorically exempt from EIS requirements, the circumstances set out in WAC 197-10-190(2) apply:

> If a proposal includes a series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not, the proposal is not exempt. For these proposals, exempt actions may be undertaken prior to the threshold determination. For each such proposal a lead agency shall be determined, and a threshold determination shall be made prior to any major action with respect to the proposal, and prior to any decision by the lead agency irreversibly committing itself to adopt or approve the proposal. WAC 197-10-190(2) (emphasis added).

The exempt action of DOE in approving this ground water appropriation

was not improper even if no threshold determination was made (and therefore no EIS was written) in advance.[1]

V

Appellants cite Downtown Traffic Planning v. Royer, 26 Wn.App. 156, 612 P.2d 430 (Div. I, 1980) and language in Noel v. Cole, 98 W.2d 375 (1982) for the proposition that a categorical exemption in WAC 197-10-170 or -175 will not be valid if applied to a proposal which in fact constitutes a "major action significantly affecting the quality of the environment."

We are cognizant of the admonition in Downtown Traffic, supra, that the likely environmental effects of a proposal must be considered to determine whether it is the type of routine activity to which the legislature intended an EIS exemption to apply. We also are aware of footnote 2 in Noel, supra, wherein the Supreme Court noted that other categorical EIS exemptions relied upon by the State Department of Natural Resources, if not subjected to a narrowing construction, are overbroad. This case-law overlay to the categorical exemptions of WAC 197-10-170 prompted us to deny DOE's Motion to Dismiss this appeal as a matter of law. Thereafter this appeal was heard on the merits.

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1. We note incidentally, that a threshold determination, or exemption determination, is the province of the "lead agency." WAC 197-10-200. In a case like this one involving approvals by both state agencies and the county, the county would be the lead agency. WAC 197-10-220. Our conclusion that DOE acted correctly even if no threshold determination was made does not imply that Spokane County may not have made a negative threshold determination or exemption determination for this proposal. This record does not disclose what determination was made by Spokane County with regard to SEPA. Apparently, however, no EIS was required prior to the County's plot plan approval.

VI

DOE's determination relative to the absence of a requirement of an EIS, which is challenged in this appeal, is to be accorded substantial weight. RCW 43.21C.090. Appellants bear the burden of proving that the determination was incorrect. To do this, the proposal must be shown to be a "major action significantly affecting the quality of the environment." Downtown Traffic, supra, p. 165. Generally, this means that "more than a moderate effect on the quality of the environment is a reasonable probability." Norway Hill v. King County Council, 87 W.2d 267, 552 P.2d 674 (1976). This ground water appropriation, at less than 1/20th of the amount exempted by regulation, together with development of a corresponding number of mobile homes on approximately 10 acres in the area in question has not been shown, on this record, to bear a reasonable probability of more than a moderate effect upon the quality of the environment. Appellants have not carried their burden of proof. DOE's approval of this ground water appropriation should be affirmed.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The approval granted by the Department of Ecology to Arthur Pagnotta for appropriation of public ground water is hereby affirmed.

DONE this 16th day of March, 1983.

POLLUTION CONTROL HEARINGS BOARD

GAYLE ROTHROCK, Chairman

DAVID AKANA, Member

LAWRENCE J. FAULK, Member

WILLIAM A. HARRISON
Administrative Law Judge